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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 344

F. L. MENDEZ & COMPANY,
Petitioner and Appellant,
vs.
GENERAL MOTORS CORPORATION,
Respondent and Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Your petitioner, respectfully showing that it is a corporation existing under the laws of the State of Indiana, (R. 1) prays this court for the issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review a final judgment of said Circuit Court affirming a judgment of the District Court for the Northern District of Indiana, South Bend Division, entered on the 2nd day of July, 1946. (R. 53.) Said final judgment

of the Circuit Court of Appeals was rendered on the 8th day of May, 1947, and petition for rehearing was denied on the 12th day of June, 1947.

This is an action to recover treble damages pursuant to provisions of Section 4 of the Clayton Act (Title 15, Section 15 of the United States Code) alleging that the respondent violated Section 3 of the Clayton Act (Title 15, Section 14 of the United States Code). The respondent filed a motion to dismiss or, in the alternative, for summary judgment pursuant to Rule 56(b) of the Rules of Civil Procedure, and attached to its motion an affidavit containing six exhibits, to-wit: Petitioner's second amended complaint in civil cause No. 472, being Exhibit "A"; the answer of respondent to petitioner's second amended complaint in civil cause No. 472, being Exhibit "B"; the verdict of the jury, being Exhibit "C"; the order of the court on said verdict, being Exhibit "D"; the court's charge to the jury, being Exhibit "E"; and the complaint in this cause, being Exhibit "F". The motion of the respondent was based on the theory that a judgment in its favor in a former suit brought by the petitioner against the respondent and General Motors Acceptance Corporation of Indiana adjudicated the issues involved in this second suit and that the cause of action in the two suits were the same.

The question presented for the trial court and the Circuit Court of Appeals was: Does an adjudication in favor of defendant on a complaint for treble damages under Section 1 of the Sherman Act (Title 15, Section 1, of the United States Code) alleging injury to petitioner because of a conspiracy effectuated against petitioner preclude and bar a second suit by petitioner for treble damages under Section 3 of the Clayton Act (Title 15, Section 14, of the United States Code) alleging injury by reason of the imposition of conditions that petitioner not take on a

competitive product? Both the trial court and the Circuit Court of Appeals held that only one cause of action was involved in both suits and, in the second suit, merely an additional ground was alleged to sustain the same cause of action as stated in the first suit. Therefore, applying the doctrine of *res judicata,* the second suit was held barred.

Petitioner's complaint in its first suit (R. 11-20) alleged the respondent and others entered into a conspiracy existing on the 7th day of April, 1937, and for a long time prior thereto (R. 14) to force petitioner to finance through General Motors Acceptance Corporation of Indiana and enumerated certain specific acts done by the respondent and others to effectuate the said conspiracy. (R. 14-18.) Petitioner further alleged that as a result of such conspiracy it was damaged. (R. 19.) The respondent denied the existence of said conspiracy and claimed that no damage had resulted to petitioner as a result of any conspiracy. At the trial, respondent further contended that the reason it had cancelled petitioner's Pontiac motor franchise was because petitioner had taken the Packard franchise, a car competitive with those produced by respondent. (R. 38.) The court refused to instruct the jury, even though requested by petitioner, that if petitioner's franchise was cancelled because it had taken on a competitive product, it was a violation of the anti-trust laws and should be considered by the jury in determining the validity of the defense. (R. 52-53.)

Plaintiff's complaint in its second suit alleged that respondent imposed as a condition to granting a Pontiac franchise that plaintiff not sell a competitive product; that plaintiff took on a competitive product, namely, Packard; that respondent cancelled plaintiff's Pontiac franchise, resulting in damage to plaintiff; all in violation of the Clayton Act.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals that actions brought under Section 1 of the Sherman Act (Title 15, Section 1 of the United States Code) and Section 3 of the Clayton Act (Title 15, Section 14, of the United States Code) are one and the same cause of action is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Buckeye Powder Company* v. *E. I. DuPont de Nemours Powder Company,* 223 Fed. 881.

2. The decision of the Circuit Court of Appeals that actions brought under Section 1 of the Sherman Act (Title 15, Section 1, of the United States Code) and Section 3 of the Clayton Act (Title 15, Section 14, of the United States Code) are one and the same cause of action is a decision on a Federal question in conflict with the applicable decisions of this Court.

3. The great importance of the anti-trust laws to the business world requires an authoritative and elucidating decision on the issue involved.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this court a full and complete transcript of the record and the proceedings of said Circuit Court of Appeals for the Seventh Circuit had in the case numbered and entitled on its docket No. 9200, F. L. Mendez and Company, Appellant, *vs.* General Motors Corporation, Appellee, to the end that this cause may be reviewed and determined by this court as provided for

by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Seventh Circuit be reviewed by the court and for such further relief as to this court may seem proper.

Dated this 9th day of September, 1947.

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GENERAL MOTORS CORPORATION,
Respondent and Appellee.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 161 Fed. (2d) 695 and in record page 64.

II.

JURISDICTION.

1. The date of the judgment that is sought to be reviewed is June 12, 1947.

2. The statutes which are believed to sustain the jurisdiction of this Court is Title 28 of the United States Code, Section 350 (43 Stat. 940 as amended February 13, 1925) and Title 15, Section 15, of the United States Code (38 Stat. 731, Section 4).

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under page 1, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

Point A.

The conclusion of the Seventh Circuit that Section 1 of the Sherman Act and Section 14 of the Clayton Act provide only one cause of action with different grounds and not two causes of action is in conflict with the decision of the Third Circuit in the case of *Buckeye Powder Company* v. *E. I. DuPont de Nemours Powder Company*, 223 Fed. 881.

POINT B.

The Circuit Court of Appeals erred in determining that the decision of this court in the case of the *United Shoe Machine Company* v. *The United States*, 250 U. S. 451, and in the case of *Standard Fashion Company* v. *Magrane-Houston Company*, 258 U. S. 346, were not determinative of this question.

POINT C.

The Circuit Court erred in its application of the rule *res judicata*, which holding will severely handicap the effective enforcement of the anti-trust laws of the United States and a determinative ruling of this court is necessary.

V.

ARGUMENT.

Summary of the Argument.

POINT A.

The Third Circuit had previously determined that the Clayton Act and the Sherman Act stated different civil causes of action.

POINT B.

This court has determined that the Clayton Act and the Sherman Act state different causes of action.

POINT C.

The rule of the Circuit Court makes effective enforcement of the anti-trust laws by civil action almost impossible and encourages monopoly.

A.

The Circuit Court of Appeals for the Third Circuit in the case of *Buckeye Powder Company* v. *E. I. DuPont de Nemours Powder Company*, 223 Fed. 881, where appellant complained of the trial court's requirement that it elect which counts it would insist on before the jury, the Court said at page 887:

> "* * * that a declaration in a similar suit under the same section was bad for duplicity because it combined two causes of action in one count * * *."

The Court said at page 886:

> "The question of duplicity was thus raised at an early stage, and as a result of that decision an

amended declaration was afterwards filed. But this also contained only one count, and as Judge Lanning (sitting in the Circuit Court for the District of New Jersey) had already decided in *Rice* v. *Standard Oil Co.*, (C. C.) 134 Fed. 464, that a declaration in a similar suit under the same section was bad for duplicity because it combined two causes of action in one count, we think the trial judge was sufficiently justified in requiring the plaintiff to elect."

The Third Circuit Court had clearly indicated that the respective counts clearly and explicity set forth separate causes of action. Thus, the holding of the Seventh Circuit that actions brought under the Clayton Act and the Sherman Act state the same causes of action is clearly and irrevocably in conflict with the decision of the Third Circuit. The Court in its opinion failed to consider this factor at all and did not distinguish this case.

B.

This Court has clearly in the case of *United Shoe Machine Company* v. *The United States,* 258 U. S. 451, held that the Sherman Act and the Clayton Act do not state the same cause of action. This Court in answering the contention of the appellant in the above cited case that the action was *res judicata* at page 460 answered:

"The cause of action is, therefore, not the same."

The Circuit Court of Appeals for the Seventh Circuit has sought to distinguish the holding of this Court in the above cited case on the basis that the decision therein was applicable only to the Government and not to private litigants. Yet this court had the opportunity to make such a distinction and refused to do so. This Court rejected the Circuit Court of Appeals' opinion on the ground that the doctrine of *res judicata* was not available to the Govern-

ment or that the Government had a different status than that of a private litigant. Rather, this Court relied on the case of the *Standard Fashion Company* v. *Magrane-Houston Company,* 250 U. S. 346, a civil action wherein the court determined that the Sherman Anti-Trust Law and the Clayton Act stated two different causes of action.

Petitioner feels that the decision of the Seventh Circuit is clearly in conflict with the above decided decisions of this Court.

C.

If the rule established by the Seventh Circuit Court of Appeals is to prevail, then, one of the most effective means of enforcing anti-trust laws of the United States has been abolished by court decision. Congress in enacting the Clayton Act, and specifically Section 4 thereof providing for the recovery of treble damages and attorney's fees, encouraged civil enforcement as the Congress recognized that enforcement of the anti-trust laws in order to be effective must depend upon civil actions. This is particularly true today when business has grown to its present size and with the increased danger of monopolies resulting in higher prices and limited production. The present case illustrates the danger of the rule promulgated by the Seventh Circuit. Petitioner, in filing its original action, presumed that the respondent acted in the manner that it did to petitioner's detriment because of the existing conspiracy. Petitioner's belief was heightened by the fact that a criminal action brought by the Government was successfully concluded against the respondent and others in the same Court in which Petitioner filed its action and in which an officer of the petitioner was a witness on behalf of the Government as to the existence of the conspiracy charged. (R. 32.) It was not until the last witness in

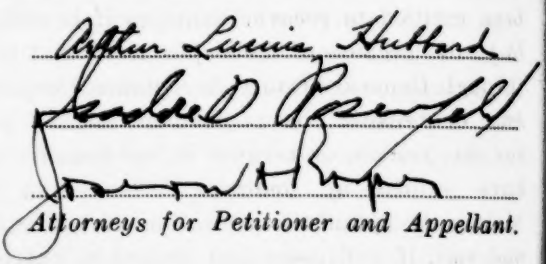
chief in the first suit that any evidence whatsoever was introduced as to the cause of the petitioner's cancellation.

The rule as established by the Seventh Circuit additionally errs to the detriment of civil enforcement of the anti-trust laws in that where the damages may differ in the two actions, the Seventh Circuit has refused to recognize this distinction. In the first action, the petitioner's allegation of damages was based on the impact of the conspiracy against him; whereas, in the second suit, the petitioner's allegation of damages is based on losses resulting because of the prohibition from handling a competitive car. To illustrate, petitioner, without amending or in any respect changing the allegations of its first complaint, would have been entitled to recover damages if it could show that it lost sales because of the requirement that cars be financed through General Motors Acceptance Corporation of Indiana, or because the respondent refused to deliver cars for this reason, or because it lost benefits which it would have gained by financing other than with General Motors Acceptance Corporation of Indiana. In the second suit, if petitioner had elected to cancel the Packard franchise, then, he could have recovered damages for the failure to make sales of Packard automobiles, which sales were made impossible by the acts of the respondent. It is essential to the proper enforcement of the anti-trust laws that the business world be advised as to what rights exist thereunder. Thus, as in this case, where there is existent a franchise agreement giving to respondent the right to cancel without cause and without reason (R. 30-31), must a party who has every reason to believe that such cancellation was based upon an illegal act, which information is exclusively within the control of the wrongful party, give at his peril why and what sections of the anti-trust laws have been violated? The holding of the Seventh Circuit

in effect means that every individual guilty of violating the anti-trust laws will state: "No, we did not violate the provisions which you contend but rather violated other provisions" and as a result escape free of damages for their wrongful acts! Such a rule will make the enforcement of the anti-trust laws by civil action impossible.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.



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